No. 238.

Brf. of Edwards for Appellee.

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Supreme Court of the United States

OCTOBER TERM, 1900.

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THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

STEPHEN TALTY, APPELLEE.

Appeal from the Court of Claims.

BRIEF FOR APPELLEE.

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IN THE

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BRIEF FOR APPELLEE.

This is an appeal from the decision of the Court of Claims, rendered in a proceeding under the act of Congress approved June 16, 1880, entitled—

> "An Act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes" (21 Statutes at Large, 284).

This case was instituted and tried, under the aforesaid act of June 16, 1880, to recover compensation for work done and materials furnished under certain contracts entered into by the appellee with the appellant (Rec., pp. 4, 5, 6, 7). The Court of Claims after hearing the evidence, and argument of counsel, rendered judgment in favor of the appellee, on the 20th of February, 1899 (Rec., p. 12).

2. That after deducting certain payments and credits, the court found that there was due the appellee for materials

furnished and labor performed under his contracts, at written contract rates, the sum of $4,180.44, due and payable March 18, 1876 (Rec., p. 12).

The appellant assigns for errors, (p. 21 of its Brief) as follows:

I. The court erred in trying this case upon the "amended petition" and reports of referee.

II. The court erred in treating the "amended petition" as a substitute for the original petition, no effort having been made to supply the original petition or to prove the contents thereof.

In reply appellee says that the Court of Claims and the Supreme Court of the United States fully decided that the court of claims is not bound by technical pleadings; that the particular form of the petition does not preclude the claimant from recovering what was fairly shown by the evidence to be due to him.

17 Court of Claims, 111, 303.
12 Wallace, 259.
16 Court of Claims, 301.
110 U. S. 385.
95 U. S. 532.

III. The court erred in confirming the reports of the referee herein.

The original measurements as proved by the appellee (Rec., pp. 4, 5) also proved the amount of work done by the appellee, and was made by the District engineers.

IV. The court erred in overruling the first, second, third and fourth exceptions to the report of the referee (Rec., pp. 11–12).

The appellee's reply to this is: That—

The first exception of the appellant was that the referee erred in treating paper number one as final (Rec., p. 11).

By reference to said report, page 7, it will be seen that the referee considered it along with the other evidence, as

proving that the claimant had done the work as found on page 7 of his report (Rec., pp. 4 and 5).

The second exception of appellant says, that the referee erred in stating the account as contained in the above mentioned paper (Rec., p. 12).

The answer to the first exception, answers this.

Said paper gives the name of the contractor as Stephen Talty, the different kinds of work, is signed by District engineer, and the District Engineer McComb swears that it is correct (Rec., pp. 4 and 5).

The third exception of the appellant says, that the referee erred in stating the accounts between the parties, there being no competent evidence to support the same (Rec., p. 12).

The original grade sheet; the original measurements by the District engineers; the sworn answers of the District Commissioners; Lieutenant Hoxies' measurement and the deposition of McComb, District engineer, all conclusively prove the facts as found by the referee.

This court has always received said evidence as competent and conclusive.

The fourth exception of appellant says, that the referee erred in stating the account according to the ledger (Rec., p. 12).

The answer to the first exception answers this.

V. The court erred in overruling the fifth exception to the report of the referee.

The fifth exception of appellant says, that the referee erred in rejecting the statement of Donavan (Rec., p. 12).

The statement of Donavan is only a private letter to Mr. Brannigan, and the referee was correct in deciding that it was incompetent evidence, as also did the Court of Claims.

There is no evidence to support his statement; all the evidence completely contradicts it, and there ought to be no weight given to it.

The claimant's case was referred to Donavan, who made a report to the court which was not confirmed, and not

being correct, the case was again referred to him, and he never made a report to the court under this last reference, being dead. The case was referred to Mr. Hackett, who makes the present report.

V½. The court erred in overruling defendant's motion for a new trial (Rec., p. 12).

The appellant's motions for a new trial were:

First. Because the findings do not include (what he calls) the memorandum report of Donovan (Rec., pp. 14 and 15).

In reply, appellee says that this memorandum letter is only the private letter of Donavan to Brannigan. It was not made to the court, as required by law. It is not signed by Donavan as referee. It is incompetent evidence, disproved by all the other evidence; was fully discussed at the trial by both parties and was fully considered by the court and disposed of.

Second. The appellant said that the court failed to pass upon the appellant's exceptions to the referee's report (Rec., p. 13).

In reply, appellee says that when the court confirmed the referee's report by adopting it as its findings, the court most effectually passed upon all the appellant's exceptions.

Third. The appellant said that the court erred in adopting board rates instead of contract rates (Rec., p. 13).

In reply, appellee says the above statement is misleading, because the rates in contract 826 are fixed, and are identically the same as board rates, and the two contracts called extensions, provide that board rates shall be paid, and for work done under the extension contracts this court has always allowed the rate as provided by them.

Fourth. The appellant said that the court erred in adopting board rates for the work done under the extension contracts, instead of those under contract 826.

In reply appellee says, as last above stated, that the rates

in contract 826, the extensions and board rates, are identically the same, and the rate allowed by the court is only the rate as written in the contracts.

Fifth. The appellant said that the court erred in separating the account of the work done under contract 826 and the extensions (Rec., p. 13).

In reply appellee says, this fact makes no difference, as the prices in the contracts are the same as board rates for different kinds of work and different contracts.

Sixth. The appellant said that the court erred in allowing an amended petition to be filed instead of a substituted petition (Rec., p. 13).

In reply appellee says that the Court of Claims and the Supreme Court of the United States fully decided that the Court of Claims is not bound by technical pleadings; that the particular form of the petition does not preclude the claimant from recovering what was fairly shown by the evidence to be due to him.

17 Court of Claims, 111, 303.
12 Wallace, 259.
16 Court of Claims, 301.
110 U. S. 385.
95 U. S. 532.

Seventh. The appellant said that the findings were contrary to the evidence; that the following evidence was introduced by appellant—the letter of Donovan (Rec., pp. 14 and 15).

The appellee's reply to this is that the letter of Donovan was disproved by all the other evidence in the case. See answer to first request; and was only a private letter and not competent evidence.

Eighth. The appellant said that since the report of Referee Hackett, the following paper has been discovered,

and asks to be allowed to introduce it as newly discovered evidence (which is merely a receipt of one Lyons, that he took 23 vouchers in this case out and returned them to the clerk) (Rec., p. 15).

This is no evidence; it proves nothing whatever.

VI. The court erred in making the order upon the request of findings of fact by the appellant, "request of defendants for findings disallowed" (Rec., p. 20).

The appellants' one, two, three and four requests for findings, are immaterial and irrelevant (Rec. p. 16).

The Fifth request, the court has already found; the contracts and extensions are set out in full in the court's findings (Rec., pp. 21, 22, 23).

Appellant says exceptions were taken (Rec. p. 24); filed March 1, 1900. This was over a year after the judgment of February 20, 1899, was rendered, and which has not been set aside, but remains in full force and effect.

The appellant's Sixth request refers to Donovan's private letter to Brannigan which is incompetent evidence, and, if not, was disproved by all the other evidence in the cause (Rec., p. 13).

The Seventh request: That the greater part of the settlement was made at board rates, and not at the rates fixed in contract 826.

An examination of contract 826, and the extensions, and board rates, *will prove that they are all the same; no difference whatever; and the price allowed by the court was only contract price.*

VII. The court erred in refusing to receive the evidence offered by defendant as set out in the request for findings of fact.

The answer to the above assignment of error is that the evidence offered by appellant (Rec., p. 16) was immaterial, irrelevant and incompetent.

VIII. The court erred in confining its findings to contract

No. 826 and extensions (Rec. p. 25). The excess of payments was made under contract 826; these are all that the *appellant ever claimed as a set-off*; and the appellant, as well as the said Donavan, make the mistake in assuming, that the contracts fix the price for the three items claimed, as set-off (Rec. p. 25), when in fact they do not, and the court only allowed a reasonable price for the three items claimed as a set-off. There was no overpayment and therefore no set-off.

IX. The court erred in rendering judgment for the claimant. The appellee says, that the evidence before the court fully sustained the findings, and the judgment of the court was correct.

ARGUMENT.

The findings of fact are conclusive:

> Mahan *vs.* United States, 14 Wallace, 109.
> Stone *vs.* United States, 164 U. S. 382.

In the latter case this court says:

> "The findings of the Court of Claims in an action at law determine all matters of fact precisely as the verdict of a jury."

They import absolute verity.

Upon these findings the court's conclusion of law is, that the appellee is entitled to recover the sum of $4,180.44, due and payable March 18, 1876.

The appellant did not make his motion for a new trial within the time required by law.

The proviso to section 4, of the act of June 16, 1880, (21 Stat. 284) requires that a motion for a new trial "shall" be made within twenty days from the date of the judgment—whereas the judgment in this cause was rendered February 20, 1899 (Rec., p. 1[illegible], and the defendant's motion for a

new trial was not filed until March 15, 1899 (Rec., p. 12), or over twenty-three days after the date of the judgment, and was overruled January 8, 1900 (Rec., p. 16), and the appeal not allowed until March 1, 1900 (Rec., p. 26.)

As the law fixed the time, it could not be extended, and a motion can not be made thereafter.

It is so decided by the United States Supreme Court in the case of Davis *vs.* Miller, 130 U. S. 284. In construing section 2931 of the Revised Statutes, the court said:

> "The phrase, '*within ten days after such entry*,' was thus treated as fixing a *terminus ad quem* and not a *terminus a quo*, or, in other words, as limiting the time after which a protest should not be made, but permitting it to be made as early as could have been made under the previous law."

See, also, Case of Kirby, Original No. 13, and Cranford *vs.* Hoffman, Original No. 14, ex parte, decided October term, 1900.

Sunday is counted the same as any other day in computing time.

137 U. S. 549.
144 U. S. 505.

The appellant did not take his appeal within 90 days from the date of the judgment, as required by law. It was more than a year after the rendition of the judgment of February 20, 1899 (Rec., p. 12), before the appeal was taken (Rec., p. 26).

The time having expired in which a motion for a new trial could be made, and no appeal having been taken within 90 days from the rendition of the judgment, the Court of Claims lost jurisdiction of the case, and all proceedings had thereafter in said court were utterly null and void and of no effect whatever, and the appeal should not have been granted.

The appellant in his argument (p. 22 of the Brief), assumes, that because the papers that were before court were lost, that therefore, the evidence of their contents could not be proven—the fact is that the lost papers were made out from the original grade sheets of the measurement of the work—and there is no evidence that the grade sheets are not now in the appellant's possession—and could have been produced if they so desired.

In the errors assigned, by appellant, the V exception (Rec., p. 12) to referee's report and the I exception (Rec., p. 14 and 15) for a new trial and the VI request of appellant for findings (Rec., p. 13), all relate to the irrelevant, and incompetent private letters of Donovan.

The appellant (Rec., p. 1) in his brief, says: "The case was referred, and afterwards, re-referred, to Dan Donavan, a referee."

The first reference was November 6, 1882, and re-referred March 31, 1886, and Donavan died without making a report under the last reference, and the record, as made by the appellant, discloses the fact that the Attorney General by his letter, on Record p. 13, agreed to pay the referee $10 a day in obtaining evidence for the defense (Rec., p. 13).

As the referee was appointed by the court, and the law fixed his compensation, he was supposed to be an impartial referee, not in the employment of either party. Such employment by the appellant was without the knowledge or consent of appellee or his attorney, and only when the letter was filed with the motion for a new trial, was such employment known by appellee. Under such facts, no weight should be given to the letter.

The appellant has cited various decisions as to amendment of the petitions, which are rendered by State courts, which are not applicable to this case, and more especially in view of the decisions of this court in 110 U. S. 385 and 95 U. S. 532.

The statement appellant refers to on page 30 of his brief,

is only a private letter of Donavan to Brannigan, an assistant in the Attorney General's office. It was held to be incompetent evidence by the referee and also by the court, and disproved by the other evidence in the case.

Appellant says on page 36 of his brief that the referee accepted the amended petition and "he refused to receive any evidence outside of that."

The referee's report, on pages 4 and 5 of the Record, states that the deposition of a witness was taken that proved the original measurement of the work done by appellee as set out on Rec. p. 23.

The court gave judgment February 20, 1899, (Rec., p. 12), which has not been set aside—no new trial, and therefore, what the court undertook to do on the 26th day of February, 1900, did not set aside the former judgment.

Appellant, on page 29 of his brief, refers to a counterclaim. The referee and the court refused to allow this counterclaim because there was no price in the contract for them, and the referee and the court allowed a reasonable price therefor; the appellant never claimed any other set-off, than the three items on Rec. p. 25, and these items were for work outside of the contract; the appellant in his brief, (p. 41), contends that appellees should be charged with *laches*, but this case comes entirely within the decision of this court as decided in—

168 U. S. 685.
160 U. S. 186.
145 U. S. 368.

The appellant prohibited in 1881 any information being given claimant as to the amount due him (see Commissioners' Report, 1881, p. 15).

All the account and measurement of claimant's work was kept by appellant, and it was not until 1895 or 1896 that the claimant learned that the vouchers and measurement for the K street work were not returned to the court, and which prove the sum due him, and made at the time the

work was done, and said contracts and extensions and measurements are in the same condition today as when made. The condition of parties is identically the same today as then, and therefore no *laches* can be charged to the claimant.

The claimant relied upon the action of the Commissioners in 1881, including all the vouchers and measurements, and did not discover that it did not until 1895 or 1896, and then he immediately had the court to issue a call for the said vouchers and measurement.

The claimant having done the work, the defendant having measured it and received a benefit from it, is liable, even if the contracts were void, which they are not; and even if the transaction was positively prohibited by law, the claimant would still be entitled to recover the value of the work done for the defendant.

20 Ct. Cls. 164.
19 Wallace, 489.
95 U. S. 539, 542.
160 U. S. 553.

The appellant claims that a substituted petition ought to have been filed instead of an amended petition. The amended petition contains all of the facts which a substituted petition would contain. The appellant's attorneys forget, and the Court of Claims, as well as this Supreme Court, has over and over again most emphatically decided, that the particular form of the petition ought not to prevent the claimant from recovering what is shown by the evidence to be due him.

17 Ct. Cls. 111.
16 Ct. Cls. 301.
12 Wallace, 259.
110 U. S. 385.

The amended petition was filed before any evidence was taken or judgment rendered, and therefore not controlled

by the State decisions referred to by appellant. No objections or exceptions were taken by appellant until after judgment. The first exception was when the motion for a new trial was filed (Rec., p. 13), which was too late.

The appellant's motion for a new trial is not made under section 1088 of the United States Statutes (Rec., p. 12), and even if it was it would be too late, as it was not filed within the time required by law.

All the proceedings after February 20, 1899, are beyond the jurisdiction of the Court of Claims and this court.

See authorities before cited.

The appellant, in his brief (p. 44), line 3, says:

> "Strictly, perhaps, under the decisions of this court, the refusal of the motion for a new trial is not subject to review."

After such a statement, why does the appellant want this court to review evidence and the immaterial facts outside of the findings of the Court of Claims?

The record in this case (Rec., p. 26) discloses the fact that the appeal filed March 1, 1900 (Rec., p. 26), is taken from the judgment of February 26, 1899, and not from the alleged entry of a judgment of February 26, 1900 (Rec., p. 24); this certainly comes too late.

The findings of the court set forth in full the written contracts, the work done by appellee, and only allow the contract price for such work, except the three items (Rec., p. 25) in which no price was fixed by the contracts, and for these items the court allowed a reasonable price.

From the Record the appellee contends that the appeal should either be dismissed, or that the judgment of the Court of Claims should be affirmed with 10 per cent. damages.

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